83-721

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1984

No.

ARTHUR T. DAVIDSON, M.D., ESQ.

Petitioner,

versus

THE CONNECTICUT BANK AND TRUST COMPANY
and J. Thomas Johnson, Assistant Counsel
of the CONNECTICUT BANK AND TRUST COMPANY

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR T. DAVIDSON, M.D., ESQ.
16 Montgomery Place
New Rochelle, New York 10804
(212) 756-1708

Attorney for Petitioner

QUESTIONS PRESENTED

The following questions are now posed for resolution by this Court:

1. Whether the Court of Appeals for the Second Circuit can treat attorneys-equally and similarly situated-different, solely on the basis of race?

2. Whether the Court of Appeals can punish a Black attorney for exercising his United States Constitutionally guaranteed rights of freedom of expression and freedom of religion?

3. Whether the Court of Appeals for the Second Circuit can mete out cruel and inhuman punishment to a Black attorney in retaliation for the Black attorney filing charges of racial discrimination against a United States Federal Judge?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Arthur T. Davidson, M.D., Esq., prays that a writ of certiorari issue to review the judgment and opinion

of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 15, 1983.

OPINIONS BELOW

The opinion of the District Court and of the Court of Appeals for the Second Circuit is set out in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1983. Mr. Justice Thurgood J. Marshall, on September 20, 1983, extended the time for filing the petition for certiorari until October 12, 1983.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

TIONAL PROVISIONS INVOLVED

CONSTITUTI

This case se involves the freedom of ex-
pression and nd freedom of religion clauses
of the First st Amendment to the United
States Const stitution; the cruel and inhu-
man clause c of the Eighth Amendment of the
Constitutior on of the United States; and
Section I o of the Fourteenth Amendment of
the Constit tution of the United States.

STATEMENT OF THE CASE

S

Petition ner and his wife had on deposit
at defendan nt bank, the Connecticut Bank
and Trust C Company, in 1980 a sum of money
in excess o of $50,000.00. On November 25,
1980, Petit tioner bought a $50,000.00 -15
% --commerc cial paper from Respondent, the
Connecticut t Bank and Trust Co. The paper
matured. H However, the Connecticut Bank
and Trust C Co., in complete contra-distinc-

tion to its usual and customary policy, failed to notify Petitioner who was preoccupied with is professional activities, his Ph.D. program in Anatomy and Cell Biology; and was convalescing from a major surgical operation. As a consequence of the failure to notify the funds were placed in a low interest-bearing account with the result that Petitioner lost a large sum of interest money. Connecticut Bank and Trust alleged that it made telephone calls to Petitioner's office and left messages on Petitioner's recording machine. This was completely untrue, as Petitioner had no telephone answering machine but rather an answering service. A notice of maturity was mailed to Petittioner from the bank's main office in Hartford, after Petitioner protested. A legal action was started in the Superior

Court, Fairfield County, State of Connect icut, and was heard on July 31, 1981. It was dismissed because of a procedural defect in that Petitioner was an out of state resident, had not posted a bond. Petitioner was informed by the Court that since the action was for the recovery for money, then the statute of limitation for a new action had not expired in the State of Connecticut. Petitioner was advised b the clerk of the court that in order to institute a new action a letter of demand for the exact mmount of money lost would have to be sent to the party in question. As directed by the clerk of the court, Petitioner sent a letter to Connecticut Bank and Trust Company as there was no case pending.

In response to Petitioner's letter to the bank, Petitioner received a letter

from Respondent Johnson accusing Petitioner of abuse of process. In response to Respondent Johnson's letter, Petitioner wrote to him outlining the gravament of the action for abuse of process. Additionally, Petitioner quoted from 1 New York Jurisprudence, Section 2, on abuse of process which states, "It has repeatedly been held that the mere institution of a civil action which has occasioned a party trouble, inconvenience and expense of defending, will not support an action for abuse of process. Public policies require that parties be permitted to avail themselves of the courts to settle their grievances so that they may do so without unnecessary exposure to suits for damages in the event of an unsuccessful prosecution." A demand for retraction was made. Respondent refused Petitioner's demand for

retraction.

On February 9, 1982, an action was filed in the United States District Court for the Southern District of New York alleging libel. At a hearing on November 5, 1982 on a Motion for Summary Judgment by Respondent, the District Court ruled that a qualified privilege existed and dismissed the action. Except for granting Respondents the right to make application for costs and attorney's fees.

An appeal to the Court of Appeals for the Second Circuit was timely filed.

There was no finding of frivolous in the Order of the Court of Appeals. The Order of the Court of Appeals was that the Appeal was frivolous, not the basic underlying action.

The Court of Appeals awarded the defendants costs and attorneys fees, and stated

that they could apply for the Court's discretion for costs and fees in the District Court action.

The decision of the Court of Appeals is being appealed to the United States Supreme Court because on its face, it was a retaliation against the Petitioner to the exercise of his first Amendment right in filing charges of racial bias against the Presiding Judge and the District Court Judge Knapp. The defendants and the Court of Appeals are incensed at the filing of the charges although the charges have been withdrawn, and are attempting now to return the Petitioner to the clutches of the District Court Judge.

The Court of Appeals in its Order, cited two cases, Ruder v. Fines and In re Hartford Textile Corporation. In Ruder v. Fines, 641 F. 2d 1128 (2d Cir. 1980), the

plaintiff Ruderar was White, and he filed approximately sixty-eight law suits, all of which had been dismissed, in which a finding of bad faith had been found before there was an imposition of costs and attorneys fees. In the second case cited by the panel of the Court of Appeals for the Second Circuit in their Order of June 15, 1983 In re Hartford Textile, 659 F. 2d 299, a Second Circuit Court case 1981, involved a White attorney, who over a three year period had inundated the court with numerous appeals, and more than one hundred motions, petitions, requests, appeals, all of which had been found to be frivolous, devoid of merit, vexatious in bad faith, repetitious, before an assessment of costs and attorneys fees was made. I state to the Court, without fear of contradiction, that to find a ruling of frivolous and to

apply cost and attorneys fees against a Black attorney in one case, is purely vindicative and racist at its most extreme.

In the finding under Rule 38 of the Federal Rules of Appellate Procedure, if the Court of Appeals determines that an appeal is frivolous, it may award damage in single or double cost to the appellee; and also under 28 U. S. C. § 1912, in order to make the award, there must be two determinations made. It has to be more than just frivolous. There must be a finding also of bad faith, and the bad faith has to indicate that when the appeal was filed the plaintiff filed it for the pure purpose of delay, harassment or sheer obstinacy. There has been no finding of bad faith in the instant case or in the appeal.

The order of the court below was in re-

taliation for Petitioner filing of a number of Equal Employment Opportunity Civil Rights suits. This was an expression of Petitioner's attorney's deep moral obligation as a Black who has been reasonably successful and who actively practices the Roman Catholic faith. The respondent and attorney have attempted to make capitol of this issue and apparently has succeeded. However, all the cases except one (1) have been settled out of Court and the action of respondents in compiling a list of these cases and of the Court of Appeals in the decision to punish Petitioner for his moral convictions is a violation of the Petitioner's rights as guaranteed by the First Amendment of the Constitution of the United States.

The American role is that costs and fees are awarded only if the case repre-

sents (1) a common fund theory, or (2) a bad faith exception. The bad faith exception has been characterized as frivolous, but the correct term is frivolous and vexatious. The basic underlying motive must be one of bad faith. It is not enough that the case be deemed frivolous. It must be shown that bad faith existed.

There was no finding of frivolous in the District Court's ruling in the original matter. The Court's ruling was that of a qualified privilege.

The Court of Appeals used the words "stern warning." A warning means just that. It is an admonition or to place a person on notice. It satisfies the due process requirement of the Fifth and Fourteenth Amendments. It does not mean to inflict cruel and inhuman punishment.

REASON FOR GRANTING THE WRIT

I. Under the American Rule Attorneys Fees Are Not Granted Unless There Is A Finding Of Bad Faith.

Argument

The traditional rule in American jurisprudence is that attorneys fees are not recoverable by a successful litigant.

> Fleischmann Distilling Corporation v. Maier Brewer Co., 386 U.S. 714, 717 (1967)

There are two exceptions to this rule, One is the "common fund," and here the court may award attorneys fees to the successful litigant, if a common fund has been protected.

Sprague v. Ticonic
National Bank, 307
U.S. 161, (1939).

The court has another exception, which is called the "bad faith" exception and was carved out by the United States Supreme Court in the case of Alyeska Pipeline Service Company v. Wilderness Society. Here the court found that the exception of bad faith required a finding not only for frivolous and vexatiousness, but that there must be from the beginning bad faith on the part of the particular person.

Alyeska Pipeline Service
Co. v. Wilderness Society,
421 U.S. 240 (1975).

II. The Finding Of The Panel Of The Court of Appeals Of The Second Circuit Was In Violation

Of Petitioner's First Amendment Rights of Freedom Of Speech And Freedom of Religion, Fourteenth Amendment's Due Process And Equal Protection Clauses And The Eighth Amendment's Cruel And Inhuman Punishment Clauses.

Argument

The finding of the Court of Appeals panel that the Appeal was frivolous of itself was a grave miscarriage of justice. The cases that were cited by the Court of Appeals were of two White plaintiffs. One, a White attorney, and the other a White employee. In the case of Ruder v. Fine, 641 F.2d 1128 (2nd Cir. 1980), the findings of the case were of an appellant who had been fired from a job before the

award of costs and attorneys fees had been made "In all the defendants estimate that the plaintiff has initiated sixty-eight law suits, virtually all of which has been dismissed. In an effort to stem a tidal wave of frivolous, vexatious and bad faith litigations initiated by the appellant, six Federal Courts have issued injunctions against him. Ruder v. Department of Justice 389 F. Supp. 549 S.D., N.Y. 1974. Here we find sixty-eight law suits and six injunctions before the Petitioner had costs and attorneys fees awarded against him. Clearly, for a Black lawyer to have this type of vindicative action on one case in which no finding of frivolous has been made is clearly an act of punishment for another alleged transgression. That is for the act of filing the charge of racial bias against

Judge Knapp. The second case in which the panel of the Second Circuit Court of Appeals quoted that of In re Hartford Textile Company, 659 F.2d 291. Here was a White attorney who was defending his mother and, in this instance over a three year period, this attorney "had inundated the Court of Appeals with more one hundred motions, petitions, requests, appeals and other filings, virtually all of which were frivolous, devoid of merit, repetitive and vexatious." Here, clearly the appellant was on notice that his actions were harassment and bad faith. More than one hundred acts had been committed. It is to be noted that both of the persons filing were White and had ample notice as required by the Fifth Amendment and the Fourteenth Amendment, neither of which has been af-

forded to the Petitioner in the instant case.

Respondents have attempted to make a great point out of the few Civil Rights cases that Petitioner has brought.

The United States Supreme Court in Havens Realty vs. Coleman resolved the question of testing. Here the Defendant, Sylvia Coleman, a Black female was a tester for an organization which wished to integrate homes. Coleman had no intention of purchasing or even renting a home or apartment that she asked to see or buy. Her only purpose was to test the compliance of the Haven Realty with the Fair Housing Law. The case went to the Supreme Court and the Court held unanimously on a unanimous opinion that was written by Justice Brennan in which Justice Powell wrote a separate concurring

opinion that a tester was entitled to the full limits and protection of Article III in the Constitution and accordingly had standing and that one could not read into the Constitution and other barriers or restrictions on standing for maintaining a suit.

Havens Realty Corp. et al
vs. Sylvia Coleman et al,
80-988 argued December 1,
1981, decided February 24,
1982.

The opinion of the Court of Appeals of the Second Circuit is vindictive and vengeful against Petitioner because Petitioner filed a charge of racial prejudice against District Court Judge Knapp.

This is a violation of Petitioner's First Amendment right of freedom of speech - our most cherished right.

The Court below, in its opinion, did not decide this case on its merits. The presiding Judge spent all of his time questioning a previous case in Connecticut that was not a party to this suit. The opinion of the Court of Appeals was completely and totally a vindictive act and an act of revenge against Petitioner who is a Black attorney and Black physician, for speaking out against the racial prejudice in the Federal judicial system.

The Court is acutely aware of the fact the Black plaintiffs are particulary vulnerable to reactions for filing suits. The case in point was demonstrated by the NAACP vs. CLAIBORNE HARDWARE, No. 81-202 - 1982. Here the Supreme Court of the State of Mississippi levied a fine of 1.5 million

against the NAACP for attempting to require that the merchants in a small town in Mississippi treat the Blacks with dignity.

The United States Supreme Court, in an unanimous decision stated that a Civil Rights group or individuals are entitled to protection by the Constitution from vindictive acts due to their exercising their First Amendment rights.

III. The Federal Judicial System, Historically, Has Been Anti-Negro/ Anti-Black.

Argument

The history of the Federal Judicial System and particularly the United States Supreme Court, deplorably has been that of

being vindictively anti-Negro/anti-Black. This unsavory aspect of the third branch of our government is not well known but has been amply reported and recorded as documented by numerous historians and educators, particularly Dr. Kenneth S. Tollett, in his book "Black Colleges As Instruments of Affirmative Action" in the chapter on The Constitutionalization of Racism and the Counter-attack. The most deplorable and dispictable record for racism, blatant and overt against Black people has been the Federal Judicial system as exemplified by the United States Supreme Court. It was the Federal Judiciary through the United States Supreme Court that alone and singlehanded was responsible for reenslaving of the Black man after the Civil War. Indeed the

Civil War was due directly to the Supreme Court decision in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). As Chief Justice Taney stated "Blacks had no rights which the White man was bound to respect."

"The Reconstruction Congress, elected after the Civil War which was precipiated, in part, by the Dred Scott case, tried to eliminate slavery and racial discrimination through responsive and protective Civil Rights Acts.

"The Thirteenth Amendment freed the slaves by prohibiting slavery and involuntary servitude. The Fourteenth Amendment reversed the Dred Scott decision by making Black citizens of the United States, prohibited the denial of equal protection and due process,

and tried to secure for Blacks the privileges or immunities of Citizens of the United States. The Fifteenth Amendment attempted to secure the right to vote against denial or abridgement on account of race, color, or previous condition of servitude.

"The various Reconstruction Civil Rights Acts attempted to enforce these Amendments in detail by protecting the rights of Blacks to inherit, purchase, lease and sell property; to enter into contracts; to be free from mob violence and night riders; and to enjoy public accommodations.

"However, the United States Supreme Court beginning in 1871 with the Blyew case and basically ending in 1899 with the application of the Plessy v. Ferguson separate-but-equal doctrine to

education in Cumming v. Richmond County Board of Education, effectively reversed any benefits to Blacks that resulted from the North's victory on the battlefield. The Court eviscerated or deflected the Civil War Amendments, particuarly the Privileges and Equal Protection Clauses of the Fourteenth Amendment. The practical effects of the Court's decisions were to undermind the protective provisions of the Reconstruction Civil Rights Acts and to virtually reenslave the Black Freedmen.

"In the Slaughter-House Cases the Court held that the Privileges and Immunities Clause of the Fourteenth Amendment only protected the privi-

leges or immunities of national citizenship-not state citizenship-from state abridgement. This meant, apriori, that unless some other provision of the Constitution prohibited it, the states were free to abridge the privileges or immunities of its citizens as state citizens. Obviously, this greatly limited the value of this clause to Blacks.

"Two years later in 1875, the Supreme Court held in United States v. Cruishank that the 1870 Civil Rights Act did not empower the Federal Government to indict and prosecute a White lynch mob for conspiring to deprive two Black citizens of their rights and privileges to assemble peacefully."

rights and privileges to assemble peacefully."[1]/

Blyew v. United States, 80 U.S. (13 Wall) 581 (1871).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Cumming v. Richmond County Board of Education 175 U.S. 528 (1899).

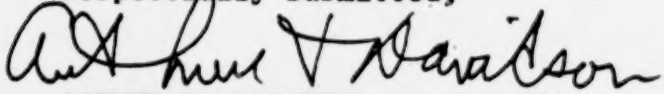
Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873).

1/Black Colleges as Instruments of Affirmative Action, by Kenneth S. Tollett, Published by Institute For The Study of Educational Policy, Howard University, Washington, D.C.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that this Petition For Certiorari be granted.

Respectfully submitted,



ARTHUR T. DAVIDSON, M.D., ESQ.
Attorney for Petitioner
16 Montgomery Place
New Rochelle, New York 10804

ADDENDUM

On October 21, 1983 in the United States District Court for the Southern District of New York at a hearing on a motion by defendants for costs and attorney's fees-in excess of $30,000.00-the Honorable Whitman Knapp, Presiding Judge, denied defendants' motion in full-even

in view of the Order of the Court of Appeals For the Second Circuit in the instant case, dated June 15, 1983.

Judge Knapp's reasoning followed almost to the letter the facts outlined in petitioner's Memorandum of Law in opposition to defendants' motion-specifically the rule as enunciated by the United States Supreme Court in Alyeska Pipeline Service Co. v. Wildness Society that, "it would be inappropriate for the Judicary, without legislative guidance, to reallocate the burdens of litigation". A "bad faith" exception was recognized but this meant more than the filing of a single suit deemed frivolous. The essence of "bad faith" was the intent to delay or harrass-as evidenced by the filing of multiple motions in the same suit or multiple actions against the same defendant.

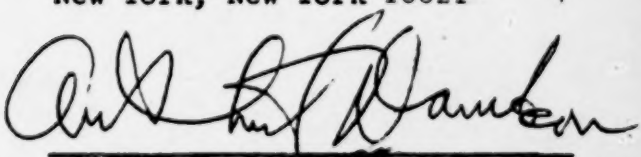
Signed _____

Arthur T. Davidson, ESQ

CERTIFICATE OF SERVICE

I certify that on this 11th day of October, A.D., 1983, three true and correct copies of the foregoing Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit were placed in the United States Mail properly addressed to:

Netter, Dowd & Alfieri, Esqs.
Attorneys for the Respondents
660 Madison Avenue
New York, New York 10021



ARTHUR T. DAVIDSON, M.D., ESQ.

CERTIFICATE OF SERVICE

I certify that on this 31st day of October, A.D., 1983, three true and correct copies of the foregoing Petitioner's petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit were placed in the United States mail properly addressed to:

Netter, Dowd & Alfieri, Esqs.
660 Madison Avenue
New York, New York 10021

ARTHUR T. DAVIDSON, M.D., ESQ.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ARTHUR T. DAVIDSON,

Plaintiff,

-against-

THE CONNECTICUT BANK AND TRUST CO. and J. THOMAS JOHNSON

Defendants.

MEMORANDUM & ORDER

82 Civ. 0827 (WK)

- - - - - - - - - - - - - - - - - - - -x

WHITMAN KNAPP, D.J.

In accordance with the ruling in open court and on the record on November 5, 1982 and for the reasons there stated defendants' motion for summary judgment is granted.

Accordingly, the complaint is dismissed with prejudice and the case is ordered closed on our docket. Defendants remain free, however, to make an application -- should they deem it advisable -- for attorney's fees after affirm-

affirmance on appeal or after the time for appeal from this order has lapsed.

SO ORDERED.

Dated: New York, New York
November 10, 1982

WHITMAN KNAPP, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of one thousand nine hundred an and eighty-three.

Present: 82-7891

Hon. James L. Oakes,

Hon. Richard J. Cardamone,

Hon. Lawrence W. Pierce,

Circuit Judges.

Arthur T. Davidson, M.D., Esq.,

Appellant,

v.

Connecticut Bank & Trust Company, and J. Thomas Johnson, Assistant Counsel, The Connecticut Bank and Trust Company,

Appellees.

O R D E R

This appeal is taken from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, Judge, dismissing on summary judgment Arthur T. Davidson's libel claim against Connecticut Bank and Trust Company and its attorney, J. Thomas Johnson.

Initially, Davidson, an attorney, sued the bank for its failure to notify him that a $50,000 30-day Certificate of Deposit he had purchased from the bank had matured. Because the money was put into a low interest bearing account after it matured, Davidson charged that the bank was responsible for his loss of under $1,000 in interest for the 54 days that elapsed before he remembered that the original Certificate of Deposit was

for only 30 days. His suit against the bank sought to recover $25,000 in damages. The bank argued that even though it had no duty to notify Davidson that 30 days had passed, notice had been sent to him and calls placed to his answering machine. The bank's attorney, J. Thomas Johnson, wrote to Davidson that "we consider your lawsuit in this case to be both frivolous and vexatious and, considering your apparent stature as an attorney, to be an abuse of process." The letter also warned that if the suit was pressed, the bank would seek to recover its costs and fees from Davidson. Davidson, rather than drop his first suit, initiated this one, charging that the bank's statements in the letter were libelous.* The district court dismissed

*Davidson argues that the letter was published" when Johnson dictated the

the case on the ground that the communication from the bank enjoyed a qualified privilege the letter reported the bank's position in Davidson's litigation and is therefore a "conditionally privileged...bona fide communication." Dano v. Royal Globe Insurance Co., 89 A.D.2d 817, 818, 453 N.Y.S.2d 528, 529 (4th Dept. 1982); Restatement (Second) of Torts §§ 586, 587. This privilege might, of course, be forfeited if Johnson's statement was knowingly false or made in reckless disregard as to its truth or falsity, id. § 600. Davidson, however, not only has made no allegation that the bank viewed Davidson's litigation in any way other than the one reported by John-

letter to a stenographer; any additional publication, Davidson concedes, was caused by his own display of the letter. See Restatement (Second) of Torts §§586, 587, and compare id. §577, comment n at 204 with id. §604, comment be at 293.

son, but the bank's reported view was also a reasonable one in light of the merits of Davidson's demand for $25,000 on an $800 claim. Davidson suggests that the privilege was inapplicable because his case was not pending when the letter was sent, but suit was filed May 27, 1981. The Johnson letter was sent to Davidson on December 30, 1981, a and the Certificate of Disposition from the Connecticut Superior Court shows that Davidson's action was not dismissed there until July 29, 1982. Davidson's argument that the conditional privilege is inapplicable because the bank's statements were malicious is as factually unsupported as his original argument that the statements were defamatory.

This appeal from Judge Knapp's decision is meritless on its face. Because

this appeal is frivolous, this court enjoys the power under Federal Rule of Appellate Procedure 38 to "award just damages and single or double costs to the appellee." The appellee moved for the award of costs and fees before the district court, which the court below denied until after an affirmance or lapse of time to appeal. The appelle has not moved for costs and fees on this appeal, but the court of appeals enjoys the power to make such an award sua sponte in an extraordinary case of manifest frivolity such as this one. See Ruderer v. Fines, 614 F.2d 1128, 1132 (7th Cir. 1980). Davidson is an attorney and our award of costs and fees is

> a stern warning that the United States Courts are not powerless to protect the public, including

> litigants who appear before the courts from the depredations of those...who hold themselves out as attorneys but who abuse the process of the Courts to harrss and annoy others with meritless, frivolous, vexatious or repetitive appeals and other proceedings.

In re Hartford Textile Corp., 659 F.2d 299, 303-06 (2d Circ. 1981), cert. denied, 455 U.S. 1018 (1982). Accordingly, we assess costs and $500 in attorney's fees against Davidson. To recover their costs and fees incurred in the district court proceeding, the appellees must renew their motion for such expenses to the court below, as Judge Knapp directed.

Judgment affirmed. Fees and costs awarded to appellee.

James L. Oakes

Richard J. Cardamone

Lawrence W. Pierce
Circuit Judges.

Filed June 15, 1983
L. Daniel Fusaro, Clerk

SUPREME COURT OF THE UNITED STATES

No. A-192

ARTHUR T. DAVIDSON,

Petitioner

v.

CONNECTICUT BANK AND TRUST COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of ~~xxxxxxxxxxxx~~ petitioner~~xxx~~

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 12 ,19 83

/s/Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 20th day of September, 19 83 .

UNITED STATES COURT OF APPEALS

for the Second Circuit

- - - - - - - - - - - - -x

In Re

CHARGE OF JUDICIAL MISCONDUCT No. 82-8506

- - - - - - - - - - - - -x

WILFRED FEINBERG, Chief Judge:

On November 26, 1982 complainant filed a complaint with the Clerk pursuant to 28 U.S.C. §372(c)(1) and Local Rule §0.24 (a) charging "racial prejudice" on the part of a district court judge handling complainant's pro se civil rights action in the district court. Complainant charges that when he entered the room to attend a pretrial conference in the case in question, the judge allegedly upon looking up and see that complainant was black, stated in a loud voice, "This is the

boot's case." Complainant claims that "boot" is a racially derogatory term, and that the judge's alleged use of this word indicates a deep-seated racial animosity on the part of the judge that precludes the judge from rendering fair and impartial decisions to any litigants who are black.

During the preliminary investigation of the complaint, complainant initially acknowledged the possibility that he had misheard the judge but reiterated that after careful thought he did not believe he had been mistaken about the judge's remark. He stated that in the seven months since the incident in question, he knew of no other statements or conduct by the judge that would demonstrate racial prejudice. The judge in question stated that he had no recollection of the event described in the complaint, but

felt certain that he had not used the word "boot" since he was not aware that "boot" had any racial meaning and also would not have used the term ignorant of its meaning. Other people who may have attended the pretrial conference (the defendants' attorneys, the judge's two law clerks and the judge's courtroom deputy) provided no evidence to support complainant's charge. Some indicated thay were not in the room when the alleged remark was made; others stated that while they may have been in the room, they have no recollection of the conference or of any of the events described by complainant. The law clerk to the judge who assisted on this case recalled the conference, but did not recall the judge having used the term "boot," a term unfamiliar to her in a

racial sense. She believes that if the judge had used a word unintelligible to her, she would have asked the judge the meaning of "boot" and then would have remembered the incident. This same law clerk suggested that the judge might have said "This is the Bronx case," since the word "Bronx" is included in the title of the lawsuit.

Aside from complainant's own statement, here is no evidence to support his claim that the judge had used "boot" as a racial slur. No one interviewed, including the judge, had any familiarity with the term, which clearly is not a term in general use. Indeed, an informal survey and review of lexicographical sources revealed that the racial gloss added to the term "boot" had its origin among southern blacks and was

brought to this part of the United States by southern blacks migrating from the South just prior to and immediately after World War I. The term appears to have no currency outside this group. Most younger generation blacks reared in the North had never heard the term used as a racial slur, and it is doubtful that many whites have ever heard the term so used. Indeed, the investigation failed to find a single white person who knows the term in that context.

Accordingly, no basis can be found for concluding that the judge in question made a racial slur indicative of racial prejudice. It appears most probable that the complainant misunderstood the judge, who most likely said something that sounded similar to the alleged remark, such as "This is the Bronx case,"

which would have been a reasonable shorthand identification of the underlying lawsuit.

When the above was explained to complainant so as to clear up his apparent misunderstanding of the judge's remark, complainant stated that he was satisfied that the investigation showed that the judge had not made an intentional racial slur and that he saw no reason for the matter to proceed any further. Under the circumstances, it is appropriate to regard the complaint as withdrawn. Thus, I hereby order that this complaint proceeding be closed.

It is further ordered that the Clerk is directed to transmit copies of this order to the complainant and to the judge whose conduct is the subject of

of this complaint.

WILFRED FEINBERG
Chief Judge

Dated: February 24, 1983